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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER,

Appellant,

vs.

CITY OF HUTCHINSON, Reno County, Kansas, a municipal corporation, HAL EVERETT, City Manager of said City, JOHN OLSON, Mayor and Member of the City Commission of said City, et al.

On Appeal From the Supreme Court of the State of Kansas

BRIEF OF APPELLANT

Opinions Below

The opinion of the District Court of Reno County, Kansas, has not been reported. The decision of the Supreme Court of the State of Kansas is reported at 178 Kan. 263, 284 P. 2d 1073. The opinions appear at Tr. 11-20,[1] and Tr. 25-33 respectively.

[1] Such references are to the page numbers in the printed "Transcript of Record" in this Court.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(2), since the case involves the question of whether a statute of the State of Kansas, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the U. S. Constitution. The judgment or decree sought to be reviewed was dated and entered on June 11, 1955, and is embodied in the aforesaid opinion of the Supreme Court of the State of Kansas, there being no separate order, judgment or decree. An order denying rehearing was dated and entered July 6, 1955. The notice of appeal to this Court was filed in the Supreme Court of the State of Kansas on September 6, 1955. The record and jurisdictional statement were filed in this Court on or before November 4, 1955. This Court noted probable jurisdiction and transferred the case to the summary calendar on January 9, 1956 (Tr. 36, 350 U. S. 930).

Constitutional Provision Involved

U. S. Constitution, Amendment XIV, Section 1:

"* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

Statutory Provision Involved

G. S. Kansas, 1949, 26-202:

"The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the

value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

Questions Presented

1. Whether G. S. 1949, 26-202 of the statutes of Kansas, which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United State Constitution.

2. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

Statement of the Case

Appellant, a resident of the City of Hutchinson, Kansas, filed an amended petition for a permanent injunction against the City of Hutchinson and its various officers in the District Court of Reno County, Kansas. The amended petition (Tr. 1-5) alleged that the plaintiff, an 80-year-old Negro with a sixth grade education, had owned certain real estate for 49 years. It was further alleged that he City of Hutchinson had filed an action for condemnation of said property in the same court against the same property, of which action plaintiff never received any notice through summons or otherwise. The action of the City, the complaint alleged, rested upon its purported power to institute such proceedings by one publication in the official City paper, which said

publication had been had, but plaintiff had never learned of these proceedings until several months after the court action had been concluded. The complaint further alleged that the "single notice so published in the official newspaper was insufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State constitutions" (Tr. 3). The answer admitted that only one such publication had been timely made (Tr. 5-6, 24). The answer claimed that the said notice by publication was sufficient under the due process clause of both the United States and Kansas constitutions (Tr. 6, 24-25). It showed that the said notice of condemnation had been addressed to approximately 33 persons, and that plaintiff's name was 25th on the list.[2] Plaintiff's reply denied the legal conclusion that the statute did not violate the Fourteenth Amendment due process clause (Tr. 10).

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[2] The addressing part of the notice of condemnation read as follows: "To: PATRICK J. O'FARRELL, AGATHA O'FARRELL, JENNIE MUELLER, KENNETH D. GITCHELL, MYRTLE GITCHELL, J. O. GITCHELL, NELLIE B. GITCHELL, EVERETT S. COLE, NINA M. COLE, NELLIE GITCHELL, PEARL D. GRAHAM, THE RAILROAD BUILDING, LAND AND SAVINGS ASSOCIATION, H. K. GORDON, VIRGINIA DEAN GORDON, V. W. COCHRAN, ANITA COCHRAN, ROY FREEMAN, J. W. WOOD, OPAL O. WOOD, FRED W. GILBERT, FERN GILBERT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF HUTCHINSON, OBLATE AND COMPANY, LEE WALKER, GLADYS G. WHITFORD, CLAUDE M. REED, ANNA EDNA REED, M. M. HAYS, RUTH J. HAYS, HERBERT K. HARRISON, THERESA R. HARRISON, W. C. WILDE, AND ALL OTHER PERSONS CONCERNED" (Tr. 7). It should be noted that the quoted notice of condemnation appears in Appellant's Abstract (Tr. 7) as part of the answer in the trial court, whereas the Appellee's Abstract does not contain the said notice of condemnation, but instead states that the answer containing the text of the notice was never filed (Tr. 23). The Clerk of this Court has made inquiry as to the reason for the discrepancy and has been advised by counsel for appellant that the answer contained in Appellant's Abstract had been served upon appellant but had never been filed, while the answer contained in Appellee's Abstract had been filed but had never been served upon counsel for appellant. However, the question of whether this notice properly appears in the record herein is immaterial, the notice having appeared in the official paper of Hutchinson, Kansas, with the result that this Court may in any event take judicial notice thereof.

The District Court, in its memorandum opinion, ruled solely on the question of constitutionality, holding that the statute did not violate the due process clause of the Fourteenth Amendment (Tr. 19-20).

The notice of appeal to the Supreme Court of Kansas specified as the sole ground for appeal that plaintiff had been deprived of his property without due process of law (Tr. 22). The Supreme Court of the State of Kansas affirmed the decision below, after discussing federal and state precedents, holding that the statute did not violate the due process clause of the Fourteenth Amendment of the U. S. Constitution (Tr. 33; 178 Kan. at 269, 284 P. 2d at 1077).

Notice of appeal to this Court was filed in the Court below, and this Court noted probable jurisdiction on January 9, 1956. The transcript of record was received by counsel for appellant on February 28, 1956.

Summary of Argument

Appellant, since he was a resident, was entitled by due process of law to personal service in condemnation proceedings rather than service by publication. This Court has previously upheld service by publication only upon non-residents. Even if the condemnation were a legislative taking—which it was not, since the taking was pursuant to judicial procedures—nonetheless a resident must be given personal service, at least to permit him the opportunity for a hearing on the question of damages to be assessed. For this involves a personal judgment, which cannot rest solely upon notice by publication.

Moreover, the more recent cases have abolished the distinction between *in rem* and *in personam* judgments for the purpose of determining what is adequate notice. They have held that a person who can be reached personally with reasonable efforts must be served personally even in *in rem*

proceedings. Since appellant's address was at all times known to appellees, service by publication did not give the appellant due process.

But even if service by publication were constitutionally permissible, notice by merely one publication is so unlikely to reach the addressee that it is not reasonable notice and hence violates due process. It would be fantasy to pretend that the notice given was in any way reasonably calculated to reach all addressees, certainly in the case of an aged and poorly-educated person like appellant, when his name is tucked away amongst numerous others.

ARGUMENT

POINT I

A resident of a state, or a person whose whereabouts can be ascertained with due diligence, is entitled to personal notice of eminent domain proceedings setting the amount of compensation. The notice by publication in this case thus did not comport with due process.

It was long ago held by this Court that service by publication cannot be the basis of a judgment *in personam* against a nonresident. *Pennoyer* v. *Neff*, 95 U. S. 714. But it was then held that since it is "the duty of the owner of real estate who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition," service by publication upon a nonresident may serve as the basis for an *in rem* judgment (*Huling* v. *Kaw Valley Railway and Improvement Co.*, 130 U. S. 559, 564), though even in such cases service by publication which is arbitrary, oppressive, and unjust violates due process of law (see *Ballard* v. *Hunter*, 204 U. S. 241, 256).

Indeed, as the Court below stated (178 Kan. at 268, 284 P. 2d at 1076), this Court once remarked that taking by

eminent domain is a legislative function, that therefore "an opportunity to be heard in advance need not be given * * *." *Georgia* v. *Chattanooga*, 264 U. S. 472, 483. However, the Court below ignored the key words "*in advance*" which this Court had used. That these words are crucial to the Court's doctrine in the *Georgia* case appears from the language in the opinion following almost immediately, which noted that no complaint was made that the owners did not have "reasonable notice and opportunity to be heard before the final determination of federal questions that may be involved in the condemnation proceedings" (264 U. S. at 483), which questions included "the amount of the compensation" (*Ibid.*)—the very question that appellant here has been foreclosed from raising. This Court later squarely held that "with respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Larramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284-5. In the *Hoffman* case, the owner also had a right to go into Court after appraisal for a trial *de novo*.

Appellant does not believe that even a legislative taking can be had without notice and hearing, for even a legislature must afford due process of law. Moreover, the legislature here invoked the aid of the judicial system, and the condemnation herein was pursuant to judicial methods. It was thus a quasi-judicial taking, and certainly the minimum requirement of due process—notice and opportunity for a hearing—was requisite to its validity. But be that as it may, the Court below erred in its constitutional rulings by failing to note that, even in the cases it cited, this Court had never ruled that service by publication upon residents could constitutionally be made by publication, and by failing to note that this Court has always required due notice in that part of condemnation proceedings involving the amount of the award. Thus, reliance of the Court below on the *Georgia* and *Hoffman* cases was misplaced. So, too, the trial Court erred in relying on *Hoffman* and *Ballard*.

The Trial Court similarly erred constitutionally in relying upon *Newman, et al.* v. *Lynchburg Investment Corporation*, 236 U. S. 692 and *Anderson National Bank* v. *Luckett*, 321 U. S. 233. For in the *Newman* case, no question of constitutionality appeared, the sole question re notice being whether the order for the notice followed the statute; and in the *Luckett* case, the only "taking" of property amounted to the substitution of the state for a bank as a depositor's debtor—this Court expressly relied upon the fact that the state held the moneys, without the depositors being deprived of property, when it upheld service by posting. *Id.* at 243.

We think we have demonstrated above that the cases cited by the Kansas Courts are clear authority for the proposition that appellant, a resident, had a right to personal service of notice, that notice by publication was constitutionally deficient. The more recent decisions of this Court, nowheres referred to by the Courts below, also necessitate a reversal of the Kansas Courts, though on a slightly different theory. These later cases do not rely on distinctions between *in rem* and *in personam* judgments or between residents and nonresidents. They more clearly recognize that the question is not the *power* of the state to secure jurisdiction and enforce judgments, but whether the notice and opportunity to be heard were so lacking as to be repugnant to due process of law, whether the notice and opportunity for a hearing were in fact fair under the circumstances.

We refer to *Mullane* v. *The Central Hanover Bank & Trust Co.*, 339 U. S. 306, and *City of New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293. The *Mullane* case held that the distinction between actions *in rem* and actions *in personam* was an artificial distinction which did not solve the problem of what was adequate notice under the due process clause of the Fourteenth Amendment. Said this Court:

> "* * * But in any event we think that the requirements of the Fourteenth Amendment to the Federal

> Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S. at 312-313.

The question in every case is whether the notice given was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * *." *Id.* at 314. This must be done "with due regard for the practicalities and peculiarities of the case * * *." *Ibid.* This opinion was ignored by the courts below.

We submit that the notice in the case at bar was given without any regard for the practicalities or peculiarities of either the individual case or the kind of cases which arise. There is no excuse in reason or law to deprive a citizen resident of a state of some form of actual notice; we have so far been unable to discover any other statute of another state permitting only notice by one publication. While it may be argued that each citizen is charged with the knowledge of the law, and that therefore each and every property owner is charged with a duty of reading the official city newspaper each and every day 365 days a year to see if any proceedings have been begun, it must be pointed out

that in the *Mullane* case the notice given to the individuals effected by publication in a local newspaper was given only after the individuals concerned had been given actual notice of the statute (339 U. S. at 310), and that this Court nonetheless ruled that such publication was not due notice. The publication there was a publication for at least four times (339 U. S. at 309-310). Publication here was given only once. The residence of plaintiff in this case was always known to the defendants; he had always paid his assessments and taxes (Tr. 2). Appellees have nowhere contended that notice given by mail would have been impracticable. Said this Court in *Mullane*:

> "As to known present beneficiaries of known places of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.
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> * * * * * *
>
> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.
>
> "In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast

notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that effects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U. S. 90, 91, 61 L. ed. 608, 37 S. Ct. 343. 61 L. Ed. 608, LRA 1917 F. 458." *Id.* at 319-20.

The doctrine of *Mullane* was shortly thereafter reinforced by this Court in the *City of New York* case, where it unanimously held that service by publication upon the City of New York was invalid even in a clearly *in rem* proceeding. Said this Court:

"Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See, e. g., Standard Oil Co. v. State of New Jersey, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from 'constructive notice' by newspaper."

* * * * * *

"The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's

claimed rights. New York City has not been accorded that kind of notice." 344 U. S. at 296, 297.[3]

Here, Lee Walker's address was always known. There was no justification for failing to give him actual service of notice. If it is unlikely that the City of New York, with a well-manned Corporation Counsel's office and thousands of agents, will not actually receive notice by publication, service by publication upon an 80-year-old man with little education is infinitely more unlikely to be effective and hence even harder to justify constitutionality.

The only excuse for procedure of notice by publication, as this Court held in *Mullane,* is that the person cannot be personally reached because his address is not known. This has been the traditional justification behind the whole doctrine of service by publication; it is surely lacking here. The statute applies both to persons whose addresses are known and those unknown. The state has failed to provide any other remedy through which a person who does not receive actual notice could reopen the case. These circumstances so shock the conscience as to amount to a severe violation of due process of law.

POINT II

Even if service by publication were constitutionally permissible, service by only one publication violates due process.

Even when a method of giving notice is constitutionally permissible, its implementation may be violative of due

[3] Still more recently, it has been held that even if a present address is unknown, reasonable efforts must be made to reach a person by mail before service by publication can be justified. *Gillespie* v. *Fort Dodge, D. M. & S. Ry. Co.*, 203 F. 2d 119 (C. A. 8, 1953). In this connection, it should be noted that appellees herein have always resorted to service by publication, despite the statutory alternative of service by mail, without any attempt to determine who are residents or who can be personally served. (Jurisdictional Statement, p. 40.)

process. *Ballard* v. *Hunter*, 204 U. S. 241, 256. Diligent search of the authorities has failed to reveal any decision by any federal court dealing with service by one publication only, nor do any statutes of other states seem to allow such skimpy effort to give actual notice.

Of course, it is impossible to imagine less quantitative notice by publication than one publication. In *Mullane*, it was held by this Court that four publications was not a sufficiently reliable means of giving notice. "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper * * *." 339 U. S. at 315. Service by one publication cuts down the chance to one-fourth what it was in *Mullane*.

It is too much to expect that every person who owns property for 50 years will examine the legal notices in the official city paper 18,250 times, poring through all the names that are mentioned. Old men with little schooling, like plaintiff, cannot be expected to receive actual notice through this device. The forlorn hope that some friend of the person affected might be such an avid reader of legal notices that he would note this and tell the property owner about it is even more forlorn when only one publication is made. There is no assurance even that a property owner will be able to receive such daily newspaper; the issue of the day might be sold out, and it is too much to expect the property owner to journey to a library to examine each issue, if indeed the library happens to contain the paper.

The opportunities for abuse by the procedures sanctioned below are great. In the case of *Collins et al.* v. *The City of Wichita, Kansas*, No. 392, U. S. Sup. Ct., Oct. Term, 1955, cert. den., 350 U. S. 886, for example, a proceeding was begun in which the landowners appeared, but a new notice of condemnation was printed in the daily paper, which did not come to anyone's attention, and the property stood condemned nonetheless through this second proceeding (Petition, pp. 6-8).

We do not believe that this Court can sanction a procedure under which a person who had enjoyed quiet possession of property for 49 years could be deprived overnight of his property and damages assessed without any actual notice, when his address was on the records of the city, through one publication in a newspaper of his name lumped with many others. If this procedure be countenanced, then divorce actions could be started solely by one publication in a newspaper; legal actions could be begun in the same fashion; and our busy citizenry would be reduced to the status of poring through small type legal notices in our newspapers without any assurance at all that they will receive notice of actions that may be begun against them or their property.

That this case represents the ultimate example of arbitrary procedure in violation of due process of law is seen from an early opinion of this Court delivered by Mr. Justice Holmes, in which just this problem was pointed out. Said this Court: "It was said that, construed as we construe it, the statute would be satisfied if a single publication were made. * * * The answer is that the court fixes the notice and will see that no injustice is done." *Newman v. Lynchburg Invest. Corp.*, 236 U. S. 692, 696. The *reductio ad absurdum* of Mr. Justice Holmes has now come to pass. What he gave as an extreme example of arbitrariness is what the court below upheld as comporting with due process. We believe that the decision below cannot stand, whether it be examined in the light of the dictum of Mr. Justice Holmes, the most recent pronouncements in *Mullane* and *City of New York*, or the cases cited in Point I (*supra*, pp. 6-12).

POINT III

The statute violates due process when construed to apply to an owner who has no notice or any reason to know of the contemplated proceedings, when he is old and has a meager education.

In the *City of New York* case, this Court rejected the contention that since the City of New York knew that proceedings affecting its interests were underway, it was bound to make inquiry as to all judicial proceedings which it knew to be pending, just as this Court in *Mullane* had rejected the notion that persons' property rights could be taken away through service by publication because they had been given specific notice of a statute so permitting.

Lee Walker is not the City of New York. Lee Walker has no Corporation Counsel who can make diligent inquiry into legal notices and pending court proceedings. When these proceedings commenced, Lee Walker was 80 years of age. He has had an education equivalent to the sixth grade only. Unlike the *City of New York*, he had no reason to know that adverse proceedings were ever going to be commenced. Unlike the depositors in *Mullane*, he had no reason to know that some day his property could be taken away without any personal notice. To assume that all property owners must keep eagle eyes posted for legal notices, that if they own land for 50 years they must examine the daily paper 365 times a year for 50 years—more than 18,000 issues—and that they must pore through the scores of names which may be printed in each issue to see if their names appear, is to create a legal fiction—or perhaps a legal fantasy—that cannot be used to sustain the deprivation of property. This Court long ago stated that "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee*, 243 U. S. 90, 91. We believe that even greater cau-

tion should be used not to let flights of fancy deny the fair play required by the Fourteenth Amendment.

The long and short of it is that Lee Walker never had notice and never could have reasonably been expected to have received notice by this one publication, and that he could have been reached easily by personal service—even a letter addressed to him at the address of his property would seem to have been sufficient. The statute which leads to such a situation is unconstitutional on its face and as applied.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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